No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is Monsanto's marketing program to be deemed per se unlawful if part of a retail price-fixing scheme?

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BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the National Association of Catalog Showroom Merchandisers (NACSM) in opposition to Petitioner. Consent has

been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

NACSM represents approximately 2,000 discount retailers who provide the same essential services as their retail competitors. NACSM members are increasingly injured by the retail price fixing of manufacturers, in a manner often termed "resale price maintenance."

NACSM was organized in 1972 to address the problem of longer established high margin retailers who objected to lower priced retail competition in the marketplace. NACSM testified before the United States Senate in 1975 in favor of repeal of resale price maintenance ("fair trade"), and has a continuing interest

in manufacturers' attempts to restrict products after they enter the free flow of interstate commerce.

NACSM believes this case raises important nationwide issues relating to retail price fixing by manufacturers of mass-merchandised products heretofore violative of Section 1 of the Sherman Act.[1]

NACSM's concern is that Petitioner, Monsanto Company ("Monsanto"), and the United States, through the Department of Justice, are inappropriately using this case as a means to change the law thereby encouraging manufacturers to coerce adherence to retail prices, which proposition, if adopted, would be detrimental to the free marketplace and to consumers.

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1. 15 U.S.C.1

SUMMARY OF ARGUMENT

Competition is most workable on the retail level, and interbrand competition is generally not fostered by curtailing intrabrand competition. The burden of proof has not been met to reverse seventy years of legislative and judicial precedent on the subject of price fixing.

Spray-Rite offered more than sufficient evidence for the jury to find that defendant and one or more of its distributors agreed, conspired and/or combined to stabilize retail prices, and to deny plaintiff access to products as a part of a price fixing scheme.

Moreover, the intervention of the Department of Justice has raised a nationwide alarm to the critical issue of whether the court should abandon

a per se test in determining whether manufacturers' price fixing conspiracies violate Section 1 of the Sherman Act, and thus retard or eliminate the development of efficient and effective low overhead retail distribution systems.

The arguments offered to support manufacturers' control of prices throughout the economic channels of distribution are in error, and do not meet the burden of the preponderance of the credible evidence. This is not a case of "elusive evidentiary standards", but rather a daring, unsubstantiated attempt to assert a "new marketplace reality of a joint venture distribution network" controlled by manufacturers and excluding non-cooperative, that is discount,retailers.

Monsanto went well beyond any unilateral refusal to deal by coercing and combining to eliminate retail price cutting, and retail price cutters. Its actions should be subjected to the per se rule of construction.

In its most elemental sense, the manufacturer attitude is "it was my product and I can fix prices on it if I choose."

It is our belief that this is not the law, never was the law, and we would respectfully suggest that in the full light of public debate, never will be the law.

Some suggest an exception to their generally perceived benefit of retail price fixing if there is collusion on the same competitive level. However, if we are going to focus on economic effect and permit price fixing when it

is imposed by the supplier, we fail to see the need to differentiate between retailers or distributors who "meet in a back room" to effectuate the same purpose, at least if the agreement only encompasses a limited product line. The present rule to the contrary should be upheld and once a combination can be reasonably inferred from all of the credible evidence by the trier of fact, a violation of Section 1 must be recognized.

If this were not the law, unlawful conduct would be limited to those cases where numerous different brand manufacturers adopt a similar market practice of resale price maintenance with concomitant price stabilization that could clearly be traced to higher prices for competing brands, that is until almost everyone begins to

charge a higher price for their brand name products. As we understand it, at this point even the Justice Department would withdraw its support for resale price maintenance and would object to the continuation of these oligopolistic practices.

We ask the Court to take judicial notice that there are numerous consumer product lines presently dominated by a handful of manufacturers, and that the ultimate result of encouraging retail price fixing is predictable.

As more fully discussed below, it is not "new entrants" but dominant manufacturers such as Monsanto and makers of many mass-merchandised consumer products who have created a consumer demand and who are able to, and do, attempt to maintain non-competitive retail prices. Recent

petitions to the Federal Trade Commission requesting relief from court approved orders banning vertical restrictions suggest that as a general rule, it is long entrenched suppliers who object to lower priced retailers because they can make more money by fixing prices. Thus, the expression "free rider" most aptly applies to those who wish to be protected from competition whether on the supplier or the retailer level.

The case of Continental T.V., Inc. v. G.T.E. Sylvania, 2 recognized the distinction restating that price restraints are unlawful per se. We respectfully suggest that this is a sound position and if there is to be such a sweeping change in the law, the case need be made to the Congress of

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2. 433 U.S. 36 (1977).

the United States after opportunity for full public debate.

ARGUMENT

I. THE REASONS FOR A *PER SE* RULE ARE IMBEDDED IN LEGISLATIVE INTENT

We look with wonder at the Department of Justice complaint of low prices.

It is said that if competitors on the same "horizonal" level agree to fix prices, it is "collusive" and unlawful *per se*. However, if the price fixing is in a "vertical" (supplier/purchaser) relationship, we are told to look at the "motivation". If it is not dealer-coerced, it is said not to be an evil. In this upside down world, vertical price fixing is praised if the participating buyers and sellers perceive it is to their economic advantage.

Congressional intent is boldly replaced with Departmental policy rather than meeting the extraordinary burden of showing that a century of judicial precedent and marketplace experience is wrong by offering empirical data and statistical evidence. We respectfully suggest that the case at bar does not provide an adequate basis to meet that burden.

The issue was fully considered by the United States Congress, which overwhelmingly reaffirmed the generally accepted recognition that price fixing by manufacturers is wrong, when it repealed the fair trade laws. 3.

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3. The Consumer Goods Pricing Act of 1975, Pub. L., No. 94-145 89 Stat. 801, amending 15 U.S.C. Section 1, 45(a).

This Court recognized the intent of the Congress in the G.T.E. Sylvania case when it noted that:

> "As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in White Motor Co. v. United States, Mr. Justice Brennan noted that, unlike nonprice restrictions, "resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." . . . Furthermore,

> Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975. No similar expression of congressional intent exists for nonprice restrictions. 4. (All Citations omitted).

There has been no change in the law. No evidence has been provided to support this request to abrogate the antitrust laws and the proposition that price fixing is a social and economic good.

Congressional concern was recently reflected in U.S. House of Representatives Judiciary Authorization Bill, Section 14, unanimously reported to the floor by the full Committee, which directed that no funds authorized

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4. G.T.E.Sylvania at 52, n.18

thereunder shall be used to "overturn or alter the per se prohibition of resale price maintenance in effect under the federal antitrust laws." 5.

The United States Senate, in a Joint Resolution sponsored by at least 48 Senators, has called on the Department of Justice and all other federal agencies to enforce the federal antitrust laws including the per se ban on resale price maintenance. 6.

In addition, we are apprised that a group of United States Senators and Congressmen feel compelled to file an Amicus brief in this case on behalf of respondent Spray-Rite.

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5. H.R. Res. No. 2912, 98th Cong. 1st Sess. (1983)

6. S.Joint Res. 105, 98th Cong. 1st Sess. (1983)

While we recognize the unusual nature of the above reference in a case between two private parties, we are compelled to address an issue that we perceive as a threat to the entire discount retail industry, without the benefit of full public debate.

II. PRIOR PRECEDENT IS NOT OVERRULED BY ASSERTING THAT MONSANTO WAS NOT SUBJECT TO ANTITRUST SCRUTINY UNDER THE PER SE RULE.

Petitioner and the Department of Justice, recognizing the extent of evidence of the horizontal nature of the combination submitted to the jury in the case at bar, wrestle to ignore it, turning instead to the adequacy of the multitude of evidence considered.

Petitioner argues that there was insufficient evidence of horizontal aspect to satisfy a finding of a

combination to stabilize prices and cut off price fixers.

The law as enunciated in Klors v. Broadway Hale Stores, Inc. 7. clearly recognized that a group boycott among a group of manufacturers and retailers can be a per se violation of the Sherman Act.

In United States v. General Motors Corp., 8. the Supreme Court characterized a case where dealers and a manufacturer prevented other dealers from selling to discounters as "a classic conspiracy" which deprived dealers of their right to sell through discounters if they chose, stating that there was no need to even inquire into economic motivation. The case at bar

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7. 359 U.S. 207 (1959)

8. 384 U.S. 127 (1966)

is not one of mere imposition of dealer location restrictions which the Court permitted to be judged under a rule of reason standard as in GTE Sylvania, supra. Petitioner attempts to differentiate its "dead hand" tactics by asserting that the conspiracy is conceived at the top, not by the dealers, and that such initiation of the scheme removes its anticompetitive nature and effect.

When, as in the case at bar, the trier of fact is presented with evidence to reasonably conclude that a combination existed, it is of little assistance to petitioner to point out that prior cases also found such a combination.

A similar system to maintain resale prices was struck down by the Supreme

Court in Simpson v. Union Oil Co. 9. Union Oil developed a plan under which its independent dealers fixed the prices at which the gasoline was to be sold. The Court held that when a device is "used to cover a vast distribution system, fixing prices through many retail outlets," the antitrust laws prohibit such a practice.

Enforcement of price maintenance has long been recognized as a violation of law. In Federal Trade Commission v. Beechnut Packing Co., 10. the defendant used code numbers on its products and instituted a system of reporting; an offender was cut off and reinstated upon assuring that he would maintain prices in the future. The Supreme Court recognized that this

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9. 377 U.S. 13 (1964)

10. 257 U.S. 441 (1922)

hindered and obstructed the free and natural flow of commerce in the channels of interstate trade.

This rule has been consistently applied as the law of the land by our courts. For example, in United States v. Parke, Davis and Co. 11. the company put into effect a program to promote observance of minimum retail prices by retailers involved. The U.S. Supreme Court stated that:

> ... In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act..." Id. at 45.

The entire policy was tainted with the "vice of...illegality," cf. United

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11. 362 U.S. 29 (1960)

States v. Bausch & Lomb Optical Co., 12. when Parke Davis used it as the vehicle to gain participation in the program to effectuate the retailers adherance to the suggested retail prices.

The Department of Justice argues that the Court of Appeals erred in ruling that the jury could find a new marketing program of "territorial assignments" to be a per se violation of Section 1 merely because it was alleged to have an effect on price, and thus to be part of a resale price maintenance scheme by permitting the line between non-price and price arrangements to be "blurred" in this way. It argues that the Court of Appeals' ruling undermines the approach

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12. 321 U.S. 707 (1944)

adopted by this Court in Sylvania, supra, and exposes the difficulties inherent in analyzing "non-price" vertical restrictions under the rule of reason, while treating vertical price restrictions -- resale price maintenance -- as unlawful per se.

The Department concedes that resale price maintenance can cause adverse competitive effects at which the antitrust laws properly are aimed. But it next asserts, without adequate support, that the existence of the conditions under which such adverse effects might occur usually are ascertainable through examination of a limited set of objective factors, and, when such effects are demonstrated, the practice will be unlawful under the rule of reason. The Department's brief next boldly asserts, without evidence or

even economic analysis, that virtually all of the adverse competitive effects of resale price maintenance will occur: (1) where a group of manufacturers attempts to use the practice to police and strengthen a cartel among themselves; and (2) where one or more of a manufacturer's distributors, in order to exercise market power or form or police a cartel, coerce the manufacturer (and perhaps other suppliers) to impose an inefficient resale price maintenance system -- one that reduces quantities sold -- for the benefit of the coercing distributors.

The Department of Justice and the petitioner have utterly failed to show that retail price fixing only occurs in a "cartel" situation, or that even if it did, that there is a preponderance

of pro-competitive effects that generally arise. Indeed, almost all experience of the courts, of public debate before the Congress, and in the marketplace are to the contrary.

The Court has not been given sufficient reason to abandon its per se prohibition against price fixing. The last time the issue received the full airing of public debate was at hearings prior to repeal of the "fair trade" laws.

At these hearings Senator Edward Brooke, among others, cited compelling reasons for removing this "federal umbrella for legalized price fixing". 13. President Ford, in January, 1975, supported repeal and

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13. Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. at 1,3 (1975)

assailed the fair trade laws for allowing manufacturers "to dictate retail prices". 14. The Chairman of the Federal Trade Commission stated "I have tried to think of any argument in favor of maintenance of the fair trade laws. I could not think of any". 15. The Assistant Attorney General in charge of the Antitrust Division agreed. 16. The "fair trade" law was repealed by Congress at that time whereupon it was determined that henceforth these practices were unlawful.

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14. Id. at 285

15. Id. at 9, 16

16. Id. at 16

III. THE BURDEN UPON THE COURTS AND LITIGANTS PROVIDES A SOUND BASIS FOR CONTINUATION OF THE CLEAR LEGAL STANDARD.

There will be a major increase in antitrust cases if manufacturer price fixing is encouraged, with each case requiring detailed economic scrutiny and analysis, thereby placing a major additional burden on our already overcrowded courts. 17.

Despite the explanation by proponents of retail price fixing that it will permit more manufacturer flexibility, its opponents point out

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17. There has been a 14.2% increase in total federal cases commenced in the last five years. While antitrust cases declined from 1477 in 1978 to 1,066 in 1982, these "big" cases require major discovery and protracted trials placing a disportionate load on the federal judicial system. See Administrative Office of U.S. Courts, Table of District Court Cases 1978-1982 (1982).

that it will promote price rigidity and tangled economic "self regulation" and relationships which are not readily measured by merely determining if there may have been a manufacturer cartel.

The Department of Justice suggests that it merely seeks to have a rule of reason analysis applied to each particular case. However, concomitantly the certainty in this area of the law will be removed. It will be more difficult and costly for plaintiffs to bring retail price fixing cases.

Simultaneously, the Department now seeks to have the Congress amend the antitrust laws to eliminate treble damages in other than per se cases. 18.

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18. There are similar attempts by the Department to limit antitrust plaintiffs to single damages in all

Under a judicial rule of reason with single damages, other than for those few plaintiffs fortunate enough to prevail, there will be a reality that price fixing by manufacturers will be "good" until someone proves them "bad" (and in fact prove that a cartel existed if the Department of Justice evidentiary standard is adopted).

It is difficult for the catalog showroom industry to understand why anyone would wish to accomplish this, and prevent them from selling consumer goods at competitive retail prices

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Footnote from page 26 continued.

intellectual property cases by amendment to 35 U.S.C. 271, and 17. U.S.C. 501 (such as the patented Monsanto herbicides which are the products at issue in the case at bar). See, 44 Antitrust & Trade Regulation Reporter 713 (March 31, 1983)

especially since, as discussed herein, there is generally no basis for the purported "free rider" problem.

It is difficult to understand why the issue is raised in the case at bar, which is not an appropriate case for the discussion. It is respectfully suggested that the court need not abandon the per se rule to determine adequate basis for finding a clear violation of the antitrust laws in the case, under any standard.

The Court is requested to take judicial notice of the fact that many mass-merchandised consumer products are produced primarily by foreign manufacturers, and often sold through U.S. marketing subsidiaries. The ability to increase profit margins by setting United States retail prices has not been demonstrated to be of such

social or economic welfare to the United States of America to justify the attendant costs of such manufacturer control. Furthermore, there are present attempts to expand manufacturer control by preventing actual and potential price competition from the importation of competing products. The end result would be to make the United States an island of high prices in an otherwise worldwide sea of competitive prices. 19.

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19. See Bell & Howell:Mamiya Co. v Masel Supply Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), app. pending before the U.S. Court of Appeals for the Second Circuit,Civ 82-7857, amicus brief in support of defendants filed by the U.S. Department of Justice and argued March 28, 1983.

IV. THE FREE RIDER ARGUMENT IS ILLUSORY

The Department of Justice suggests that this case threatens to stifle many types of procompetitive non-price restraints taken by manufacturers to improve their products' competitive position because it allows the jury to consider if the evidence supports a retail price fixing scheme which is then judged under a per se standard.

To encourage general retail price fixing by manufacturers on the hope that it may somehow encourage interbrand competition is to ignore the benefit of competition on the retail level, where it is most workable because of the large number of competitors.

It is argued by proponents of resale price maintenance that if the only effect of retail price fixing is

to elevate prices, the marketing program will fail, or that it is inconsistent with the profit seeking objective of the manufacturer to allow its distributors to earn above-competitive profits. There is no support offered for these assertions; none exists. It is not necessary for a manufacturer cartel to exist for the participating supplier and retailers to mutually benefit from above-competitive prices so long as there is sufficient brand identification for the public to pay a price above what retail price competition would otherwise create.

Indeed, a primary motive for manufacturers such as Monsanto to adopt resale price maintenance schemes is to encourage distributors and retailers to promote their products over that of competitors because of the higher profit margin the selling retailer will

otherwise earn. The purpose is to assure that all cooperators will earn an artificially higher profit than they will earn on competing brands, where retail price competition does exist. This is the essence of almost all price fixing schemes.

There is a serious question as to whether interbrand competition even existed in the case at bar, with the record replete with testimony about a unique, patented herbicide. However, even assuming, arguendo, that interbrand competition existed, there is a further serious question as to whether a sufficient case has been made to eliminate the per se proscription of agreements, or coercion to enforce retail price fixing. This suggestion that interbrand competition is, in most instances, assumed to be increased if

intrabrand competition is eliminated is also a dubious proposition without evidentiary support. In order to point to the success of such programs, proponents point to more profits reaped from the higher prices they have been able to charge. A similar analysis would apply to all price fixers.

As did Spray-Rite in the case at bar, catalog showrooms and many other discount retailers provide the same services as their higher-margin competitors. Moreover, the factual pretext of "free rider" 20. is unsupported by the evidence, and unfounded.

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20. The "free rider" effect is also set forth in the case of Davis Watkins Co. v. Service Merchandise Co., 686 F.2d 1190, 1195, n. 8 (6th Cir. 1982), petition for cert. filed, 51 U.S.L.W., 3421 (U.S. November 19, 1982) (No. 82-848)

However, assuming for purposes of argument, that there are such ancillary services to be provided to the consumer, we suggest that it is the consumer to whom the choice should be left to determine whether or not the services are worth the extra price. Our entire economic system is predicated on this mechanism to allocate resources; manufacturer control for alleged "efficiencies" is conversely a concept alien to our antitrust laws.

Professor H. Michael Mann 21., in

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21. H. Michael Mann, Chairman of the Department of Economics, Boston College, is former Director of the Federal Trade Commission, Bureau of Economics. The references to his arguments are taken from a paper presented to United States House of Representatives Judiciary Committee on March 9, 1983 entitled "Resale Price Maintenance, Antitrust and Per Se Illegality:Reason for a Change?" All footnotes herein are taken from Prof. Mann's original paper.

a recent paper addressed to the House Judiciary Committee, dissects the economic arguments proposed to support a solution to a purported "free rider problem" concluding that this concept does not support resale price maintenance.

Proponents argue that resale price maintenance is a means of providing an incentive to retailers to offer certain services viewed as necessary to market the product. It is said that the incentive to provide the services will be blunted if some retailers avoid such responsibility and instead charge lower prices, reflecting their lower costs from the lack of provision of the services and that sales of the product suffer.

Resale price maintenance is not an appropriate means of avoiding this "problem" because it removes price as a competitive weapon and forces retailers to compete by non-price methods by offering the services said to be necessary to enhance product sales. Resale price maintenance is claimed to be a reasonable policy in the context of the free rider problem, and so it is said per se illegality for this practice is unjustified.

This proposition is questionable when we consider all the conditions that would have to exist for there to be any serious risk of free riders.

Professor Mann initially notes that the service has to be pre-sale. Any service that is post-sale, (such as credit), is linked to a particular

dealer. No other dealer can free ride on these particular kinds of services.

Secondly, the service has to be product, not dealer, specific. This means that there has to be something about the product that requires a pre-sale service such as demonstration or instruction about its use.

Thirdly, the service cannot be separately priced. If it can, then there is no free ride.

Fourth, the free rider problem is not eliminated if the customer can obtain the service from one dealer and buy the product from another retailer, since the higher price is not related to the service provided.

Lastly, the product need be one for which the retailer is an important source of information about the

product's characteristics, often called a "nonconvenience good." 22. It is important to distinguish the conceptual difference between having a retailer explain and instruct about a product, and having a retailer "push" a particular manufacturer's brand of product. The latter amounts to point-of-sale advertising for a particular manufacturer. The free rider problem cannot exist as the motivation in the latter instance where resale price maintenance necessarily leads to the payment of unnecessarily higher prices. This is so because the above-competitive margin is a reward fashioned by a manufacturer for payment to a retailer for telling consumers

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22. For the taxonomy, See Porter, M. Interbrand Choice, Strategy, and Bilateral Market Power, 23-24 (1976).

that his product is preferrable; it is not related to any real "services".

Professor Mann notes the conditions are extremely restrictive and that of the sixteen products for which retail price maintenance was principally found, six are convenience goods 23., the kind of products for which a free rider case under resale price maintenance simply cannot exist. 24.

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23. Hearings on Fair Trade Laws before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary (Useem, H.), 94th Cong. 1st Sess. at 323 (1975). The designation of convenience goods comes from Porter, M. op. cit. supra, table 6-1, at 139-40

.24. Before repeal of the fair trade laws by the Congress, numerous manufacturers utilizing resale-price maintenance sold unsophisticated consumer products where it is particularly difficult to apply the service argument. Recent F.T.C. cases suggest that many proponents of a resurrection of fair trade continue to be

It is important to note here that the imposition of resale price maintenance in order to maintain these outlets may, in fact, inhibit the evolution of efficient distribution methods. 25.

Footnotes from page 39 continued.

companies in industries that obviously require little in the way of unique services such as apparel, Matter of Levi Strauss, F.T.C. Docket No. 9081 (7/12/78); Candy, (Matter of Russell Stover, F.T.C. Docket No. 9140 (7/1/82), and chinaware (Matter of Lenox, F.T.C. Docket No. 8718 (7/12/82). These companies have higher recognizable brand names and are convenience customer goods that do not require the sales assistance that would otherwise lie at the heart of any free rider problem.

25. Porter, op. cit. supra, at 66-67; For an excellent, more general elaboration of this important point (the need to promote retailer efficiency through discount outlets) See Steiner R. Vertical Restraints and Economic Efficiency, Federal Trade Commission Working Paper No. 66, (June, 1982).

The use of retail price maintenance also indicates that the manufacturer's product possesses strong brand image. The reason is that the image retards retailers from effectively selling competing brands not subject to retail price maintenance since consumers expect the retailer to carry the product. 26.

Of course, this brand identification is what the manufacturer longs to use to induce sales above otherwise competitive retail prices. The additional support given by the retailer to promote brand

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26. This reasoning has been called a "mutual dependence theory." The manufacturer and the retailer need each other and their interaction strengthens product differentiation. Bowman, W. Jr., Resale Price Maintenance--A Monopoly Problem, J. Bus. (Univ. Chic.) (July 1952); See also Porter, op. cit. supra at 65.

identification that is already strong actually weakens interbrand competition. If the manufacturer is to be subject to any pressure on price, it has to come from intra-brand price competition, to wit; competition among retailers. Resale price maintenance permits the manufacturer's product differentiation advantage to escape any pressure on the wholesale price that might come from vigorous retail price competition. 27.

Since significant product differentiation appears to be a major force in explaining rising concentration levels in consumer goods

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27. Peter Gerhart, The 'Competitive Advantages' Explanation for Interbrand Restraints: An Antitrust Analysis, 3 Duke Law Journal, 417, 431 (1981).

industries over the last 30 years and is a major barrier to new entry 28., it clearly does not seem sensible to tolerate a practice conducive to promoting structural conditions that are monopolistic. This is particularly so when the costs of retail price fixing to the consumer in prices paid

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28. Muller W. and Rogers R. The Role of Advertising in Changing Concentration of Manufacturing Industries, Rev. Econ & Stat. (Feb. 1980); Joe Bain's finding, in his classic study, Barrier to New Competition (1956), that product differentiation advantages constitute the most important entry barrier has, to the best of our knowledge, not been refuted.

have been so well documented. 29.

Professor Mann concludes that the case for retail price maintenance is frail. The conditions under which it might conceivably benefit consumers by being a perceived solution to the free rider problem are so restrictive that it is difficult to imagine a circumstance where retail price maintenance would be helpful, particularly in the absence of any evidence of the kind of consumer behavior presumed by the free rider argument. Moreover, there are more plausible reasons for the desire to use retail price maintenance, all of which blunt, not enhance, the forces of

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29. Hearings on Fair Trade Laws before Senate Subcommittee, supra, at 323, 327.

competition. To engage the judicial process in the exercise of discovering whether a retail price maintenance situation might be defensible carries no more weight than the same kind of argumentation that certain circumstances might justify horizontal price-fixing. 30. It only raises the costs of investigation and litigation inordinately relative to the small probability of finding some benefit.

Professor Mann's analysis applies to the case at bar, where an efficient distributor providing better service at lower prices was driven from the market place by a group of other retailers

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30. Scherer, F.M., Industrial Market Structure and Economic Performance, 509, 513 (1980).

acting in concert with a manufacturer to achieve maximum advantage of a widely acceptable product by eliminating retail price competition.

One of the best, succinct, analyses rejecting the free rider argument states

> "...in an age when advertising has effectively pre-sold so many brand names is the retailer really providing any extra useful service to the consumer in exchange for that higher margin? It's nice to know that he carries a broad selection, but without fair trade wouldn't an enterprising merchant carry as broad a line...as his customers demanded?
>
> Whatever feeble justification may once have existed for fair trade, there is no reason today to place such heavy burdens on the consumer public". 31.

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31. Cong. Rec. 1268 (1/23/75):Art. by Ronald Reagan as introd. by Rep. Syms.

CONCLUSION

To expand manufacturer control over independent distributors, and those to whom they sell, by allowing combinations to fix retail prices and to deny access to product to "price cutters" is to reverse a century of judicial precedent.

Neither petitioner nor amici in its behalf have justified such a departure from the existing antitrust laws. It is not justified by the record in this case and is contrary to the legislative intent. It is such a sweeping revision of the antitrust laws as to properly be a subject for the Congress of the United States to debate and determine.

The Judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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